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IN THE

Supreme Court of the United States

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, *et al.*,
Petitioners,

v.

TIMOTHY M. COHANE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF AMICI CURIAE OF THE AMERICAN COUNCIL ON EDUCATION, ET AL. IN SUPPORT OF PETITIONERS

ADA MELOY
General Counsel
AMERICAN COUNCIL ON EDUCATION
One Dupont Circle, N.W.
Washington, D.C. 20036
(202) 939-9361

CATHERINE E. STETSON
CHRISTOPHER T. HANDMAN*
DOMINIC F. PERELLA
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5719

*Counsel of Record

Counsel for Amici Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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Financial Aid Sources for Kansas Students, available at http://www.kansasregents.org/ download/ financialaid/FAFKS%2007-08%20App.pdf 8

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BRIEF AMICI CURIAE OF THE AMERICAN COUNCIL ON EDUCATION, ET AL. IN SUPPORT OF PETITIONERS

STATEMENT OF INTEREST OF AMICI CURIAE

Amici curiae, a group of organizations that together represent most of the institutions of higher education in the United States, submit this brief in support of petitioners.

Founded in 1918, the American Council on Education ("ACE") is the nation's unifying voice for higher education. Its more than 1,800 members include a substantial majority of colleges and universities in the United States.[1] ACE

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[1] Pursuant to this Court's Rule 37.6, amici note that no part of this brief was authored by counsel for any party, and no person or entity other than amici or their members made a monetary contribution to the preparation or submission of the brief. The brief is

represents all sectors of American higher education—public and private, large and small, denominational and nondenominational. It serves as a consensus leader on key issues and seeks to influence public policy through advocacy, research, and program initiatives.

Amicus the American Association of Community Colleges ("AACC") is the primary advocacy organization for the nation's more than 1,100 two-year, degree-granting institutions. Organized in 1920, AACC promotes the causes of its member colleges through, among other things, legislative advocacy, monitoring of national issues and trends, and research and publication of news and scholarly analysis.

Amicus the Association of American Universities ("AAU") was founded in 1900 by a group of 14 universities offering the Ph.D. degree. The AAU currently consists of 62 leading research universities in the United States and Canada. The association assists members in developing national policy positions on issues that relate to academic research, graduate and professional education, and the transfer of innovative technology from university to industry.

Amicus the National Association of State Universities and Land-Grant Colleges ("NASULGC"), founded in 1887, is the nation's oldest higher education association. NASULGC's members include 214 institutions in all 50 states, the U.S. territories, and the District of Columbia. Among their number are 17 historically black public institutions and 31 tribal colleges that became land-grant institutions in 1994 and are represented through the NASULGC membership of the American Indian Higher Education Consortium.

Amicus the National Association of Independent Colleges and Universities ("NAICU") is an association of nearly 1,000 member colleges and associations that represents the interests

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filed with the consent of the parties, and copies of the consent letters have been filed with the Clerk.

of private colleges and universities. Members include traditional liberal arts colleges, major research universities, comprehensive universities, church- and faith-related institutions, historically black colleges, single-sex colleges, art institutions, two-year colleges, and schools of law, medicine, engineering, business, and other professions.

Amicus the American Association of State Colleges and Universities ("AASCU") represents more than 400 public colleges, universities, and systems of higher education throughout the United States and its territories. AASCU schools enroll more than three million students, which is roughly 55 percent of the enrollment at all public four-year institutions.

Amicus the Association of American Medical Colleges ("AAMC") is a non-profit organization representing all 126 allopathic medical schools in the United States, nearly 400 teaching hospitals and health systems, and 94 academic and professional societies representing nearly 110,000 faculty members. AAMC serves and leads the academic medical community in improving the nation's health through medical education, research, and high-quality patient care.

Amicus the Association of Jesuit Colleges and Universities ("AJCU") represents the 28 Jesuit higher education institutions throughout the United States. AJCU is a voluntary association whose mission is to enhance quality Jesuit higher education throughout the country while working together on common mission, purpose and goals.

Amicus the Council for Higher Education Accreditation ("CHEA") is the principal nongovernmental body responsible for recognition of higher education accrediting entities. The largest institutional higher education membership organization in the United States, CHEA has approximately 3,000 degree-granting colleges and universities as members. It recognizes 60 accrediting entities, including the six re-

gional accrediting associations and various specialized, national, and professional accrediting organizations.

These organizations participate as *amici curiae* only in cases that in their estimation raise issues of widespread importance to institutions of higher education nationwide. ACE, for example, has filed briefs *amicus curiae* in this Court in recent years in cases such as *Parents Involved in Community Schools* v. *Seattle School District No. 1*, 127 S. Ct. 2738 (2007), and *Gonzaga University* v. *Doe*, 536 U.S. 273 (2002). And though these organizations rarely lend *amicus* support at the certiorari-petition stage, they have chosen to do so here because they are deeply troubled by the Second Circuit's decision. The rule that the Second Circuit embraced—that a private entity may be deemed a state actor under a "joint activity" theory based on actions taken by the state, not the private entity itself—would often leave private colleges and universities exposed to Section 1983 liability when they interact with state bodies. The Second Circuit's rule would hurt public colleges and universities too; their private partners would have reason to shy away from public educational institutions to avoid Section 1983 exposure of their own. The legal principle the Second Circuit embraced, in short, could inflict enormous harm on public and private colleges and universities throughout the United States.

SUMMARY OF ARGUMENT

The Second Circuit held that a private entity (the National Collegiate Athletic Association) may be deemed to have engaged in "joint activity" with the state, and thus may be treated as a state actor, by virtue of events in which it did not participate and of which it had no knowledge—here, the unilateral actions of officials at SUNY-Buffalo. *See* Pet. App. 3a-5a. That holding is extraordinary in its ramifications. Under the Second Circuit's approach, private entities that enter into just about any relationship with the state—even a relationship that has consistently been deemed not to

compromise an entity's classification as private—expose themselves to potential Section 1983 liability. This is so because the private entity cannot know when or whether the state organ will take some action that will constitute "joint activity" and push it over the line into "state actor" status. The Second Circuit's holding thus strips private entities of control over the circumstances in which their otherwise private conduct might be deemed state action. This unprecedented approach threatens to "intolerably broaden * * * the notion of state action under the Fourteenth Amendment." *Flagg Bros., Inc.* v. *Brooks*, 436 U.S. 149, 160 n.10 (1978).

The Second Circuit's novel rule poses unique risks to America's institutions of higher education, both private and public. As to the former, interactions between private colleges and universities on the one hand, and state agencies and officials on the other, are pervasive: Private institutions accept state-sponsored scholarships, they engage in state-funded research, they collaborate with state universities, and they undergo state licensure proceedings, to name but a few. Courts have long held that such interactions with the state do not transform private institutions into state actors liable under Section 1983. But if the Second Circuit's rule is permitted to stand, these workaday interactions would become a costly civil-rights lawsuit waiting to happen. Public colleges and universities, likewise, rely heavily on interactions with private entities. Yet under the Second Circuit's rule, those private entities would have a strong incentive to reduce, draw back from, or indeed never initiate these interactions, lest they expose themselves to Section 1983 liability that they cannot control.

These unfortunate effects would not, of course, be limited to the field of higher education. As Petitioners rightly point out, the Second Circuit's approach would mean federal civil-rights exposure for "all private actors that sometimes work in conjunction with government agencies." Pet. 9. Because this expansion of the state-action doctrine is unjust and illogical,

as well as improper under this Court's binding precedents, the Court should grant the petition for certiorari and reaffirm the sensible state-action limits the Second Circuit has eschewed.

ARGUMENT

I. THE SECOND CIRCUIT'S APPROACH WOULD HARM PRIVATE AND PUBLIC INSTITUTIONS ALIKE.

The Second Circuit held that respondent Timothy Cohane stated a Section 1983 cause of action because he alleged that the NCAA was a " 'willful participant in joint activity with the state.' " Pet. App. 3a (quoting *Brentwood Acad.* v. *Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 296 (2001)). The trouble with this holding is that the NCAA's usual interactions with its pubiic member institutions do not make the NCAA a state actor, *see generally National Collegiate Athletic Ass'n* v. *Tarkanian*, 488 U.S. 179 (1988), and Cohane alleges no facts suggesting any "joint activity" over and above those usual interactions. Instead, Cohane alleges—and the Second Circuit relied on—nothing more than facts regarding the university's unilateral actions. He alleges, for example, that "the *University* forced [his] resignation * * * in an attempt to pla ate the NCAA," that the *university* "intimidated student-witnesses into giving false statements to NCAA investigators," and that "the *University* used its authority to compel witnesses to testify against him." Pet. App. 3a-4a (emphases added).[2] Cohane's allegation, in a nutshell, is that the NCAA did nothing more or less than what it does in every investigation. But under the Second

[2] He also alleges that the university engaged in these acts under the "control" of the NCAA, but as Petitioners explain, the "control" Cohane alleges is, on the face of the complaint, "simply the University's own desire to comply" with NCAA rules. Pet. 26. This Court has held that that desire does not make the NCAA a state actor. *Id.* (citing *Tarkanian*, 488 U.S. at 191).

Circuit's newly minted version of the "joint activity" test, that is enough to transform the NCAA into a state actor.

This rule conflicts with this Court's teachings on the narrowly circumscribed joint-activity test, *see* Pet. 10-15, and it makes no sense in any event. If the state-action inquiry is intended to identify private actors who have been " 'clothed with the authority of state law,' " *Tarkanian*, 488 U.S. at 191 (quoting *United States* v. *Classic*, 313 U.S. 299, 326 (1941)), the Second Circuit's rule misses the mark by ensnaring private actors who do not fit that description. It "sweeps much too broadly" by "subject[ing] to constitutional scrutiny * * * action result[ing] from the exercise of private choice." *Lebron* v. *National R.R. Passenger Corp.*, 513 U.S. 374, 411-412 (1995) (O'Connor, J., dissenting).

The potential implications of such a rule for America's colleges and universities are deeply worrisome. These educational institutions operate against a background understanding that certain types of public-private interaction—state scholarship funding, licensure decisions, and the like—will not without more transmogrify private entities into "state actors." *See* Anthony Ciolli, *Grade Non-Disclosure Policies: An Analysis of Restrictions on M.B.A. Student Speech to Employers*, 9 U. Pa. J. Lab. & Emp. L. 709, 721 (2007) (noting that "lower courts have not treated private universities as state actors" and collecting cases). The Second Circuit's decision sweeps that certainty out from under them and leaves their status as state actors *vel non* in the hands not of their own employees and agents, but of the state itself. This approach threatens to harm private educational institutions, as well as the private partners of public institutions, by ensnaring them in federal civil-rights litigation even where they are engaging in wholly private behavior.

A. The Decision Below Exposes Private Institutions To Liability Whenever They Interact With The State.

1. Private colleges and universities interact with organs of the state in countless ways. One common example is their receipt of scholarship funds and other funding from state coffers. In New York, for example, the New York State Tuition Assistance Program (TAP) provides scholarship funds for financially needy students to assist with tuition payments. Students can use these funds to pay for tuition to private universities.[3] And in Kansas, a number of state-sponsored scholarships administered by the State Board of Regents, including the Kansas Ethnic Minority Scholarship and the Kansas Comprehensive Grant, are available to state residents planning to attend private colleges.[4] Most if not all states have such programs, and by necessity, the programs create formalized interaction between state officials and the private colleges and universities whose students receive funds.[5] Nonetheless, the courts "[q]uite consistently * * * have not found state action" on this basis. *Allen* v. *Tulane Univ.*, 1993 WL 459949, at *2 (E.D. La. 1993) (collecting cases).

The Second Circuit's expansive new rule would potentially change all that. Consider, for example, a case where the state discriminates against a particular scholarship applicant,

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[3] *See* New York University, Office of the Bursar, *TAP (Tuition Assistance Program), available at* http://www.nyu.edu/bursar/loans.awards/tap.html.

[4] *See Financial Aid Sources for Kansas Students, available at* http://www.kansasregents.org/download/financialaid/FAFKS%2007-08%20App.pdf.

[5] In New York, for example, universities help students learn how to apply for TAP funds and the state imposes GPA and other requirements on TAP recipients. *See supra* n.3.

causing a private university to notify the student that there are no funds to disburse to her. Under the Second Circuit's logic, this unilateral action by the state could conceivably result in a holding that the private university is a state actor by virtue of "joint activity." This result would fly in the face of common sense, for the university in this scenario has done nothing (over and above its usual private activities) to invoke the power of the state.

2. Private colleges' and universities' attempts to police fiscal accountability could also suffer under the Second Circuit's rule. Many state laws require private colleges and universities to report to the state any fraud or misappropriation of state-provided funds, such as student aid and research grants.[6] Typically, both the educational institution and the designated state organ then investigate the alleged fraud. But under the Second Circuit's approach, this common procedure could expose private educational institutions to unprecedented Section 1983 liability. After all, any unilateral step by the state investigating agency that happens to advance the school's inquiry could be deemed "joint activity" as the Second Circuit now defines it.

3. Many states also have procedures permitting college and university students to file complaints with the state regarding matters such as overbilling by the school, misrepresentation by the school of its licensure status, or even discrimination committed by a school official.[7] Here, again, the Second Circuit's approach could create private-school liability where there heretofore was none. If the state investigative agency were to inform the accused college or university of the

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[6] *See, e.g.*, Louisiana State University, *Policy Statement: Student Employment* (citing Louisiana law), *available at* http://www.lsu.edu/financialaid/PS+33+R04.pdf.

[7] *See, e.g*, State of Wisconsin Education Approval Board, *Student Complaints*, *available at* http://eab.state.wi.us/resources/complaint.asp.

investigation, and were to take some unilateral step (like SUNY-Buffalo did in *Cohane*) that has the effect of advancing the educational institution's parallel investigation, the institution could be deemed a state actor under the joint-activity doctrine in a subsequent lawsuit by the student. This result would follow under the Second Circuit's rule even if the school had done nothing to collaborate or collude with the state in the investigative process.

4. Another common fact pattern involves security forces at private institutions interacting with municipal or state police in the course of handling a crime. The courts have typically held in these cases that, short of some action on the part of a security guard demonstrating active collusion with the police to violate a suspect's rights, the security guard (and his university employer) are not state actors. In *Sanders* v. *City of Minneapolis*, 474 F.3d 523 (8th Cir. 2007), for example, a security guard at Augsburg College saw a car driving on the sidewalk, followed it, and radioed a report that was transmitted to the Minneapolis Police Department. Officers from the Minneapolis Police Department—not the college's security guard—later shot and killed the car's driver. *Id.* at 525-526. The district court dismissed the security guard and the college from the ensuing Section 1983 lawsuit, and the Eighth Circuit affirmed, noting that the security guard "did nothing more than follow" the suspect and thus could not be "acting under color of state law." *Id.* at 527. Under the Eighth Circuit's approach, in other words, something more than the security guard's normal (private) activities would be required before he could be deemed a " 'willing participant in a joint action with public servants' " and thus a state actor. *Id.* (quoting *Johnson* v. *Outboard Marine Corp.*, 172 F.3d 531, 536 (8th Cir. 1999)).

Not so in the Second Circuit. The latter court's "joint activity" rule, as announced in *Cohane*, is so broad that the security guard (and thus the college) could be transformed into a "state actor" based on something the *city* police did

that suggested their desire to act jointly, even if the guard had nothing to do with it. This is an unacceptable result under this Court's state-action doctrine, which is designed to prevent saddling otherwise private parties with open-ended federal liability for actions beyond their control. Absent some attempt by the private actor to "clothe[ ]" itself "with the authority of state law," *Tarkanian*, 488 U.S. at 191 (quotation marks omitted) (quoting *Classic*, 313 U.S. at 326), the private actor is beyond the reach of Section 1983.

5. Private colleges and universities also routinely receive state funds for research. In California, a state agency makes grants and provides loans for research to both public and private research centers. This year, for example, it provided $1.4 million in public funds to Stanford University.[8] And in New Jersey, the state's fiscal 2001 Higher Education Budget allotted $6.5 million to a mix of public and private universities to increase their biomedical and other technology research capacities.[9] The courts have uniformly held that accepting these sorts of grants does not make the private entity a state actor. *See, e.g.*, *Carter* v. *Norfolk Cmty. Hosp. Ass'n*, 761 F.2d 970, 972 (4th Cir. 1985). Universities, in turn, have relied on that settled understanding in conducting their research and educational missions. But the Second Circuit's rule introduces doubt here too. Under its approach, a civil-rights violation committed by the state grant-dispersing organ could be enough to render the private university a state actor, even though the university had done nothing more than accept the funds and use them as it normally would.

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[8] *See* California Institute for Regenerative Medicine, *First Stem Cell Research Facilities Grants Approved* (June 5, 2007), *available at* http://www.cirm.ca.gov/press/pdf/2007/ 06-05-07.pdf.

[9] *See* Lasker Foundation, *Report on State Support for Health Research for Funding First* (Oct. 26, 2001), *available at* http://www.laskerfoundation.org/ffpages/reports/m17.htm.

6. Other examples abound. Private institutions engage in research collaborations with public-sector colleagues,[10] they interact with state agencies in the course of the licensure process,[11] they partner with public secondary schools,[12] and they employ public officials as adjunct faculty, to name a few. Under the Second Circuit's joint-activity test, any of these interactions could trigger a "state action" finding, depending on the acts not of the private institution, but of its state partner. Such an approach flies in the face of this Court's warning not to tear the "joint participation" language of *Lugar* v. *Edmondson Oil Co.*, 457 U.S. 922 (1982), "from the context out of which it arose." *American Mfrs. Mut. Ins. Co.* v. *Sullivan*, 526 U.S. 40, 57, 58 (1999). And in doing so, it illogically expands private colleges' and universities' exposure to Section 1983 liability by rendering them vulnerable even where they are performing acts that have long been held not to imperil their private status.

B. The Decision Below Would Also Harm Public Colleges And Universities By Punishing Their Private Partners.

Petitioners are correct, therefore, to assert that the Second Circuit's holding imperils "all private actors that sometimes work in conjunction with government agencies." Pet. 9. But its effects do not stop there. The Second Circuit's expansive

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[10] *See, e.g.*, New Mexico Economic Development Department, *New Mexico Technology Research Corridor Collaborative*, *available at* http://www.edd.state.nm.us/index.php?/news/entry/new_mexico_technology_research_corridor_collaborative/.

[11] *See, e.g.*, Ariz. Rev. Stat. Ann. § 32-3022 (mandating licensure for private colleges and universities and setting forth detailed operating standards).

[12] *See, e.g.*, Sean Backe, *Georgetown University and McKinley Technical High School: A Partnership in Hope*, *available at* http://socialjustice.georgetown.edu/research/McKinley_partnership.doc

"joint activity" test also ill-treats *public* actors, such as public colleges and universities, who must partner every day with private institutions—and whose ability to do so may be hampered by a sprawling new test for state action.

1. Take the higher-education accreditation process, for example. Public institutions of higher education must be accredited by a recognized accrediting body, both to fulfill state-law requirements and to be eligible for participation in Title IV of the Higher Education Act of 1965 and its concomitant student-loan programs. *See, e.g.*, 20 U.S.C. § 1001(a)(5) (establishing that certain institutions may qualify as Title IV-eligible "institutions of higher education" if they are "accredited by a nationally recognized accrediting agency or association"). This accreditation process involves regular and lengthy interactions—site visits, exchanges of reports, and the like—between the public institution under review and the private accrediting body.[13] Nonetheless, the federal courts have consistently held that the private accrediting body's accreditation processes do not, in the normal course, convert it into a "state actor." *See, e.g.*, *McKeesport Hosp.* v. *Accreditation Council for Graduate Med. Educ.*, 24 F.3d 519, 523 (3d Cir. 1994) (collecting cases).

Here, like in all of the situations described above, the Second Circuit's rule would erase that legal certainty and expose accrediting bodies to Section 1983 liability in situations entirely outside their control—namely, those where a public college or university takes unilateral steps to "cooperate" with the accrediting body. Indeed, this scenario is quite similar to the one that actually played out in *Cohane*. Say, for example, that an accrediting body seeks certain informa-

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[13] *See, e.g.*, Western Association of Schools and Colleges' Accrediting Commission for Senior Colleges and Universities, *How to Become Accredited* (Aug. 2006), *available at* http://www.wascsenior.org/wasc/PDFs/HowtoBecomeAccreditedManual8.4.06.pdf.

tion for purposes of preparing its accreditation report, and the public university being reviewed pressures its employees to provide that information. Under the Second Circuit's rule of decision, this action by the public university could convert the private accrediting body into a "state actor," even though the accrediting body did nothing to solicit—indeed, did not even know about—the university's actions. Accrediting bodies accordingly would be forced to conduct their work under a "constant threat of litigation and costly, time consuming, and extensive discovery, not to mention the potential for fee-shifting awards under § 1983." Pet. 9-10. Such a result would defy this Court's command to maintain sensible limits on just how far Section 1983 should intrude into private behavior. *See Lugar*, 457 U.S. at 936.

2. The problem, of course, is not limited to accrediting bodies. Public colleges and universities regularly interact with a whole host of private actors: They collaborate with private colleges and universities on research initiatives,[14] they interact with private primary and secondary schools in student-teaching initiatives, and they perform clinical and research work in private hospitals, to name just a handful. In all of these and many other areas, the Second Circuit's rule threatens to expose public colleges' and universities' private partners to Section 1983 liability by dint of having engaged in their usual activities. Such a rule would give these private partners incentive to minimize their interactions with public colleges and universities. *See* Pet. 9-10 (noting that the Second Circuit's rule "could cripple the [NCAA]'s ability to enforce the rules that its members have agreed upon"). Other private groups, faced with a constant threat of federal litigation over which they have no control, might choose to stop

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[14] *See, e.g.*, Caltech Media Relations, *Caltech Receives $2.5 Million to Further Research in Millimeter-Wave Astronomy* (Feb. 2, 2005) (describing joint research initiative with several public universities), *available at* http://mr.caltech.edu/media/Press_Releases/PR12645.html.

interacting with public institutions of higher education altogether. This result "would be intolerable, for it would tend to hinder and control the progress of higher learning and scientific research." *Greene* v. *Howard Univ.*, 271 F. Supp. 609, 613 (D.D.C. 1967).

II. THE SECOND CIRCUIT'S RULE CONFLICTS WITH THIS COURT'S STATE-ACTION JURISPRUDENCE.

Amici agree with Petitioners that the Second Circuit's opinion conflicts with *Tarkanian*, repudiates this Court's long-stated intention to strictly cabin the "joint activity" test, and precipitates a circuit split with the decisions of other courts of appeals. *See* Pet. 10-15. *Amici* also agree with Petitioners that the joint activity test's "only continuing vitality," if any at all, is in cases "involving express allegations that a private party has *conspired* with a state official to commit an official act that is obviously unlawful and directly harms the plaintiff." Pet. 12 (emphasis added).

Not surprisingly, therefore, the Second Circuit's decision also conflicts with another fundamental tenet of this Court's state-action jurisprudence: that before an otherwise private actor can be said to take a discrete action "under color of state law," there must be positive involvement in the complained-of action by *both* the private party and the state. The Second Circuit's approach cannot be squared with this principle. By holding, in essence, that it takes just one to tango, the Second Circuit flouts this Court's warning that "[c]areful adherence to the 'state action' requirement" is necessary to "preserve[ ] an area of individual freedom by limiting the reach of federal law." *Lugar*, 457 U.S. at 936. And it imperils the ability of America's colleges and universities to police their exposure, and that of their private partners, to Section 1983 liability.

1. In *Flagg Brothers*, 436 U.S. 149, plaintiffs sued a storage company after the company threatened to sell their

belongings to settle an unpaid bill. Because such a sale was permitted under a New York statute, plaintiffs argued that the storage company's action was "properly attributable to the State because the State ha[d] authorized and encouraged it" by enacting the statute. *Id.* at 164. This Court rejected the argument. In reaching that result, this Court reaffirmed that it "has never held that a State's mere acquiescence in a private action converts that action into that of the State." *Id.* Citing *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345 (1974), and *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163 (1972), the Court concluded: "These cases clearly rejected the notion that our prior cases permitted the imposition of Fourteenth Amendment restraints on private action by the simple device of characterizing the State's inaction as 'authorization' or 'encouragement.' " *Id.* at 164-165 (citing *Moose Lodge*, 407 U.S. at 190 (Brennan, J., dissenting)).

Likewise, in *American Manufacturers*, 526 U.S. 40, a group of workers sued their private insurers for withholding disability payments pending a disability review process, which state law authorized the insurers to do. *Id.* at 44-47. The workers argued that the insurers were amenable to suit under Section 1983 because, by relying on the statutory authorization, they were acting under color of state law. *Id.* at 47-48. This Court again rejected the argument: "As we have said before, our cases will not tolerate 'the imposition of Fourteenth Amendment restraints on private action by the simple device of characterizing the State's inaction as authorization or encouragement.' " *Id.* at 54 (quoting *Flagg Bros.*, 436 U.S. at 164-165)). Nor did it matter that the state took an active role in the disability review process by creating and supervising it: "[A] private party's mere use of the State's dispute resolution machinery, without the 'overt, significant assistance of state officials,' " cannot be considered state action, the Court concluded. *Id.* (quoting *Tulsa Prof'l Collection Servs., Inc.* v. *Pope*, 485 U.S. 478, 486 (1988)).

2. These cases stand for a sensible proposition: Unilateral action—by either a private entity or the state—is not enough to turn a private party into a state actor. And the fact that here the "inacti[ve]" party is the private entity, as opposed to the state, is a distinction without a difference, at least when it comes to the question of the *private* entity's liability. If either half of the equation is missing, the private entity and the state cannot be said to be "virtual agents," *Brentwood*, 531 U.S. at 304, and there is no reason to impose federal civil-rights liability on the private entity.

CONCLUSION

For the foregoing reasons, and those in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

ADA MELOY
General Counsel
AMERICAN COUNCIL ON EDUCATION
One Dupont Circle, N.W.
Washington, D.C. 20036
(202) 939-9361

CATHERINE E. STETSON
CHRISTOPHER T. HANDMAN*
DOMINIC F. PERELLA
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5719

*Counsel of Record

Counsel for Amici Curiae